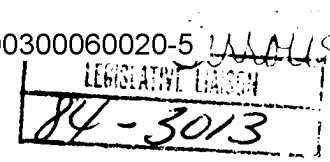

Testimony

by

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before the

Subcommittee on Security and Terrorism
Committee on the Judiciary
United States Senate

Concerning

S. 2623
(Aircraft Sabotage Act)

S. 2624
(Act for the Prevention and Punishment
of the Crime of Hostage-Taking)

S. 2625
(Act for Rewards for Information
Concerning Terrorist Acts)

S. 2626
(Prohibition Against the Training or Support
of Terrorist Organizations Act of 1984)

June 5, 1984

My name is Victoria Toensing. I am a Deputy Assistant Attorney General in the Criminal Division of the Department of Justice. Accompanying me are Messrs. Mark Richard and Wayne Gilbert. Mr. Richard is also a Deputy Assistant Attorney General in the Criminal Division. He has long been the Division's senior person dealing with internal security and terrorism matters. As a result of a recent reorganization within the Criminal Division, I now share certain areas of responsibility for terrorism mattes with him. Mr. Gilbert is a Special Agent of the Federal Bureau of Investigation and serves as a Deputy Assistant Director of the Bureau's Criminal Investigative Division.

It is a pleasure for us to appear before you today on behalf of the Administration to testify on the President's anti-terrorism legislation. We believe this package will close several loopholes in existing law and give us new and needed tools to combat international terrorism. We believe that enactment of these bills is important and that speedy action upon them should be taken by the Congress. We realize how few legislative days are available, but in our judgment these bills can still be reported out of this Subcommittee.

The final legislative package will represent policy judgments by the Congress and the Executive as to how best to protect the American public against international terrorism in the coming years. As you know, during the past decade terrorism has been on the rise. Especially alarming is the

degree to which some bandit states or organizations have engaged in heinous terrorist actions aimed at innocent victims. State supported terrorism has become a low cost method of wreaking havoc upon one's opponents. These four bills in our view address some of the risks caused by the growing worldwide terrorism problem, especially state-supported terrorism. The threat of terrorism is ever present, and one must ensure that our legal arsenal is sufficiently capable of responding to the problem. Our efforts must be strong, but they must also preserve the constitutional values and liberties which are so dear to our society. The President's package comports fully with these purposes. We look forward to working with your Subcommittee and the other involved Congressional Committees to bring these bills to passage this session. The focus of the President's bills is to deal with those groups, insurgents, and foreign governments who engage in acts of international terrorism directed against the interests of this nation and its people. We condemn, unequivocally, any terrorist act whether by friend or foe.

When the President transmitted his legislative package to the Congress he included a section-by-section analysis of each bill. Hence, we will not describe each bill in specific detail. Instead we will address the major purposes of each bill.

S. 2623

S. 2623, the "Aircraft Sabotage Act," is one piece of legislation long overdue. It has been before the Congress in one fashion or another for nearly a decade. The primary purpose of the bill is to implement fully the international obligations we assumed when we ratified the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation ("Montreal Convention") on November 1, 1972. A major obligation of the Convention is the requirement that state parties assume criminal jurisdiction over persons who destroy civil aircraft who are found within their territory even when the act was committed elsewhere and not against that country's aircraft. Current United States law does not permit such a prosecution.

Our failure to implement the Montreal Convention fully by domestic law has been a constant impediment to the efforts of our diplomats to encourage further concerted international action against terrorism. While present domestic law meets the vast majority of our obligations under the Montreal Convention (which may explain the inertia in enacting the predecessors of S. 2623) the time is now ripe for Congressional action on this non-controversial measure. In addition to plugging the gaps in existing laws relating to our treaty responsibilities, the bill also makes several minor, but desirable, changes in the statutes relating to aircraft piracy and the destruction of aircraft offenses.

S. 2624

I will now discuss S. 2624, which is directed against hostage taking.

The international community has strongly condemned hostage taking. The International Convention Against the Taking of Hostages was adopted by the United Nations on December 17, 1979. The United States has signed the treaty, and the Senate gave its advice and consent on July 30, 1981. However, before the United States can file its formal adherence to the treaty, implementing legislation must be enacted. S. 2624 is the necessary legislation.

S. 2624 amends the current federal kidnapping statute, 18 U.S.C. 1201, to implement these treaty responsibilities fully. The bill provides broad jurisdiction over the hostage taking offense. It is predicated on recognized extraterritorial principles of international law to provide for punishment of any United States national who takes hostages anywhere in the world, as well as of any perpetrator who takes a United States national hostage anywhere in the world.

Of course, as you well know, before there can be any prosecution one must also obtain personal (i.e., physical) jurisdiction over the perpetrator. Most perpetrators of hostage taking outside of the United States will and should be dealt with by the foreign government where the crime occurred. This bill is written to create federal jurisdiction in the event the perpetrator evades the jurisdiction of such court, or the court fails to mete out justice in vindication of our

interests. Of course, we could not proceed to trial unless we obtained personal jurisdiction over the perpetrator and sufficient evidence to sustain a successful prosecution.

Where the hostage taking occurs within the United States, the bill while providing for federal jurisdiction where appropriate, specifically states that state and local jurisdiction is not preempted.

S. 2624 also amends current 18 U.S.C. 1201(f) to allow the Attorney General to request assistance in hostage taking situations from any Federal, State or local agency notwithstanding any statute, rule, or regulation to the contrary. This authority presently exists only in cases of kidnappings of "internationally protected persons." Like authority is also found in other federal statutes, such as 18 U.S.C. 112(f) (assaults on protected foreign officials), 351(g) (high federal officials), and 1751(i) (president and his staff), and is for use in those rare situations where the law enforcement resources normally available to the Attorney General, such as the FBI and the Marshals Service, are not sufficient. In keeping with the historical precedent and current practice, the request for additional assistance would normally be directed, in an incremental fashion, toward other civilian authorities. Only when other civilian authorities are unable to provide the necessary assistance would the request be made to the military. Requests to the military would follow the procedures already established in this area between the Secretary of Defense and the Attorney General.

S. 2625

I would now like to turn to S. 2625, the bill that provides for payment of rewards in coping with terrorism.

In the past, terrorist groups were composed primarily of hard core ideological zealots who would never have informed upon their cohorts. In recent years, however, there are indications that violent criminal types have become associated with some terrorist groups. Because of their prior criminal experiences they are more likely to talk when caught or to inform when they feel betrayed. S. 2625 is aimed at giving the Secretary of State and the Attorney General a new tool to exploit this weakness and may help hinder terrorist activity.

The reward provisions of S. 2625 are broad. They apply to terrorist activity directed at the nation's interests, people, and property anywhere in the world. The Secretary of State is made primarily responsible for rewards relating to such activity outside the United States, while the Attorney General is responsible for that which occurs within the United States. The bill reaches domestic terrorism which may not be itself a federal crime and it also covers overseas terrorism over which there might be no federal criminal jurisdiction.

The size of the potential rewards creates a new risk to terrorist groups, especially when their activities involve individuals removed from the hard core ideological center of the group. While, as a matter of policy this Department does not favor public rewards, the threat of terrorism warrants the use of any legal tool to combat it. Unlike some reward

measures, S. 2625 is not limited to information leading only to the conviction or the arrest of the perpetrator. It covers all valuable information that can lead to the prevention, frustration, or favorable resolution of the terrorist's activities. For example, information on the location of an American hostage would be covered. Likewise covered is information on command centers and safe-houses of the terrorist groups.

While a reward of $500,000 is possible, any reward of $100,000 or more requires the approval of the President or his designee. The bill permits the Attorney General, where warranted, to grant an alien recipient permanent resident status and to place the recipient in the Witness Protection Program operated by the United States Marshals Service. No domestic or foreign public official may receive a monetary reward for any information provided, but they, too, would be eligible for admission to the United States, if an alien, and to the Witness Protection Program if either measure, or both, was deemed appropriate. Because of the need to protect the identity and location of the recipients, the Secretary of State or the Attorney General is authorized to take the steps necessary to provide appropriate safeguards in the disbursement of such rewards to avoid harmful disclosures.

S. 2625 appropriates no funds, but upon its enactment both the Department of State and the Department of Justice will seek the necessary appropriation from the Congress. This statute, even if seldom utilized, may be just the means to the

prevention of deadly attacks upon American nationals or to their successful rescue if they have been kidnapped.

S. 2626

S. 2626 is the most important and far-reaching bill in the package. Its primary purpose is to deny valuable services from American nationals to those terrorist groups which practice their terrorism against this nation's interests, people, and property. The key to understanding S. 2626 is the word "services." Current law governs the exportation of military and strategic goods and materials fairly effectively. S. 2625 will deny to terrorist groups those essential military and intelligence skills which are not forbidden them under current law, as was evident in the now infamous Wilson and Terpil matters, mentioned in Mr. Silbert's statement.

S. 2626 is not written on a clean slate. Admittedly some things it covers can be reached to a limited extent under some existing federal law (e.g., 18 U.S.C. 959). However, none of the existing measures can be easily rewritten to reach the entire range of conduct that must be denied to terrorist groups.

1. What services are denied to terrorist groups?

Three types of services are being denied terrorist groups under S. 2626. S. 2626 does not prohibit mere association, it forbids only non-verbal action upon the behalf of a terrorist group. The services denied are:

(1) service in or acting in concert with,

(2) providing training in any capacity to,

(3) providing any logistical, mechanical, maintenance, or similar support service to a terrorist group. (Proposed Section 2331(a)(1-3).)

The first category is the most broad. The phrase "service in" is easily understandable; it means, e.g., a member of the armed services. At times, however, collaborators with such groups may not be actual members of the group; they may be advisers, volunteers, or agents. Moreover, some individuals participate in terrorist groups which are not tightly organized and their association may at times be more in the nature of affiliation. The structure of terrorist groups does not always fit easily into the conceptualizations used to describe legal entities. Accordingly, the term "act in concert with" is used to cover such participants regardless of whether they were "card carrying members."

All forms of training for such groups except medical are covered. For example, how to assemble booby traps would be covered. While some training could be for apparently non-terrorist purposes, any learned skill is but a tool, that can be used for evil as well as good, depending upon the intent of the user. We should not allow some of our own nationals or our territory to be used to provide any training to any named group which has become the enemy of United States interests and intends to inflict harm on our people, property and friends.

The third class of services is actually quite limited. It includes the transporting of goods or persons (e.g., flying

transport planes on behalf of a terrorist government), the repair and maintenance of equipment, (e.g., helicopters used by a terrorist government in an invasion of another country) and the providing of similar support services (e.g., building a machinegun practice range). Sometimes these skills relate to the operation of military hardware for either defensive or offensive operations. Sometimes it may involve operation of civilian equipment for a military purpose. But the clear purpose of this measure is to tell terrorist groups to get persons other than skilled Americans to train them or to operate and repair their equipment. And it clearly ups the ante of the sanctions applicable against any American who willfully provides such "technical" services thereby facilitating the actions of the terrorist group.

It must be emphasized that the target of this bill is conduct -- conduct which directly facilitates terrorist activity. The bill is not intended to reach expressions of sympathy or moral support; it is not intended to reach lobbying; it is not intended to reach peaceful demonstrations or any other constitutionally protected activity. Nor is it intended to reach fund-raising on behalf of a terrorist group -- although we submit that a prohibition upon exporting currency to aid such a group could validly be enforced.

In the drafting of this bill Department staff has been made aware of concern that "acting in concert with" sweeps too broadly. We are perfectly willing to work with Committee staff to develop acceptable terminology that would satisfy these

concerns. The services and acts forbidden are simply those kinds of physical aid and expert assistance which skilled Americans can supply, and have supplied to hostile terrorist enterprises.

2. What terrorist groups are covered?

The groups covered are (1) international terrorists groups, (2) foreign factions (i.e., insurgents), and (3) the armed forces (including police) and intelligence agencies of a foreign government. The prohibition on services to a foreign government is limited to assistance to the armed services and intelligence agencies as they are the ones most likely to conduct the terrorist activity. S. 2626 does not prohibit services to the other components of the foreign government, such as the Departments of Agriculture, Energy, Education, etc., unless such components were acting as an agent for the military. (If it were, the prosecutor would have to prove such an agency relationship, and knowledge thereof by the defendant, beyond a reasonable doubt).

3. When would the services be prohibited?

The services would be prohibited only to those "terrorist groups" (e.g, international terrorist group, foreign insurgents or armed forces or intelligence agencies of a foreign government) for which the Secretary of State has published a determination in the Federal Register naming such group. This would come only after he has concluded that a pattern of acts or likely acts of international terrorism by that group seriously affects the national security, foreign relations, or

the physical security of United States nationals or their property. The determination would set forth the Secretary's reasons.

4. What is terrorism?

Terrorism is violent criminal conduct apparently intended (1) to intimidate or coerce a civilian population, (2) to influence the conduct of a government by intimidation or coercion, or (3) to affect the conduct of a government by assassination or kidnapping. Under S. 2626 the terrorism practice by such groups must be directed at the national security, the foreign relations, or the physical security of United States nationals or their property. Hence, this bill does not reach all international terrorism, but only that international terrorism which is directed against our own people and interests. It seems self-evident that this country should, in self-defense, attempt to deny the provision of such services by United States nationals or businesses or the use of our territory to provide such aid to those groups intending to inflict harm upon this country's people, property, and friends.

S. 2626 does not break new ground in giving a high executive officer the authority to trigger criminal sanctions when in his judgment the standards set by the Congress have been met. The Arms Export Control Act (22 U.S.C. 2751 et seq.) the Export Administration Act (50 App. U.S.C. 2401 et seq.) and the International Emergencies Economic Powers Act (50 U.S.C. 1701 et seq.) are comparable examples. (See also 50 U.S.C. 205, 22 U.S.C. 2370, 22 U.S.C. 441-457, 46 U.S.C. 143, and 50

U.S.C. 21-24.) The Secretary of State is the proper official to make such a determination for the nation. With the appropriate consultation mechanisms being added to the bill, the wisdom of these political judgments will be enhanced. The annual renewal feature will ensure that they are current. It must be remembered that the goal of this legislation is not merely to put groups on a list, but rather to give such groups added incentives to refrain from terrorist activities directed at United States interests, people, and property. If, however, they persist in such activities, the provision of services should be prohibited, and American nationals who continue to willfully provide them should face strong sanctions.

5. Is judicial review prohibited?

There has been considerable misunderstanding about proposed subsection 2331(e). This subsection does not bar all judicial review of the Secretary's determination although Congress could, should it choose to do so, bar such review. See, e.g., 50 U.S.C. App. 2412(a); Ludecke v. Watkins, 335 U.S. 160 (1947). The section properly states that a person who has provided the services should not be free to challenge the Secretary's determination after he has been caught.

The Secretary's determination is a foreign policy judgment. In most cases the vast overwhelming majority of Americans would concur with the Secretary's decision. In some cases the question may be closer. But how large a majority of the people actually concur with the Secretary's decision is really irrelevant under the law. Under our Constitution and

laws the government is responsible for making those difficult decisions necessary to preserve, protect and defend this nation against its enemies. Acting under the authority and standards given to him by the Congress the Secretary would make the determination. Such procedure is valid, wise, and constitutional. Disallowing a nonconstitutional challenge to the Secretary's determination in a criminal case is analogous to the treatment accorded a court order in a contempt prosecution. When the court issues an order, the person to whom it is directed must obey. If he does not like the order he must either seek modification from the court or, if that fails, seek relief from a higher tribunal. Should he fail to obtain modification or reversal by such proper procedures, or if he disregards such procedures, and violates the order he has committed contempt of the court and can be punished under the appropriate provisions of law even if the court order was erroneous.

The bill does not prohibit an appropriate civil action under legal standards against the Secretary to attempt to show that the Secretary has exceeded his lawful authority, e.g., acted in an arbitrary or capricious manner. Such action could be brought by a person or business with proper standing such as one who has an existing contract to supply services or intends to enter into such a contract. Admittedly the plaintiff would have a tremendous burden of proof under existing case law concerning "political questions," but that is only as it ought

to be. No one individual's or corporation's self-interest is paramount to the national interest where such self-interest is not constitutionally protected.

S. 2626 was drafted so that it would be possible to maintain a successful prosecution where warranted. Because most of the illicit conduct will occur outside the United States the ability to secure evidence to convict beyond a reasonable doubt will be limited. To require proof that the service provided be related to a specific terrorist act would be virtually impossible in our courts of law. Any statute having such an element would be nugatory and worthless in the real world. Making the gist of the offense the provision of services to a named group offers the possibility of obtaining a conviction.

There are other provisions of S. 2626 that are covered more fully in the President's section-by-section analysis. We believe, however, that our testimony has covered the major features.

In conclusion, we reiterate our awareness that of all four bills, S. 2626 has raised the most concern. In our view, much of the concern is based upon a misreading of the bill, a lack of awareness of existing laws and an excessive and unhealthy distrust of the Executive Branch. Nevertheless, we will work with you to develop language and procedures that will lead to the bill's passage. In addition to rephrasing the term "acts in concert with," we accept in principle a number of suggestions that have been made. For example: Requiring consultation between the Secretary of State and other executive

agencies; requiring consultation with the appropriate Committees of Congress before a determination is made, renewed or allowed to lapse; and develop suitable legislative findings to further guide the Secretary in making his determination. These four bills are needed by the nation. As previously expressed, we will work with your Subcommittee to facilitate passage of this essential legislation. We are confident that through a cooperative approach mutually agreeable language can be found to cure any perceived constitutional problems. We repeat our request that these bills be given prompt consideration.

This concludes our prepared remarks. I believe Mr. Gilbert has a short statement after which we would be happy to answer any questions the Subcommittee may have.

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